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IN THE

Supreme Court of the United States

OCTOBER TERM [redacted] 1969

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WILLIAM A. THORNE, Receiver,
Atlas Lumber & Door Co.,

Petitioner,

vs.

AETNA LIFE INSURANCE COMPANY,

Respondant.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR THE RESPONDANT IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Neither of the questions stated in the Petitioner's petition are properly presented for review on the record and facts in this case.

The binding receipt referred to in Petitioner's first stated question read in pertinent part:

> "The insurance . . . shall be effective from the date of medical examination (being the last examination if more than one is required by the Company)."

Reynolds was told at the time that the binding receipt was given him that he would have no coverage until such time as he had taken a second complete medical examination, an electrocardiogram and a chest x-ray which were required for the policy. Further the Company consistently required that the conditions as to the taking of these medical examinations and as to insurability be met. (Findings of Fact of the Trial Court No. 6, 11 and 13.)

The record in this case does not present the second question as worded in the Petitioner's petition for writ of certiorari. The Company did not ". . . have knowledge of all of the facts . . ." because the medical evidence available to it was not sufficient to enable it to make a determination. The reason for the lack of the evidence was Reynolds own refusal to cooperate in meeting the appointments for medical examinations set up for him. The Company had consistently required that the conditions as to the taking of the medical examination and as to insurability be met. (Findings of Fact of the Trial Court No. 13 and 14).

CONCISE STATEMENT OF THE CASE

The Petitioner's statement omits many of the important facts of the case. The correct statement of the facts of the case is contained in the Trial Court's Findings of Fact No. 6 through No. 14:

> 6. On December 10, 1964, in the presence of agent Knoop, Reynolds filled out and signed an application for a policy of life insurance with defendant company on the life of said Reynolds in the amount of One Hundred Thousand Dollars ($100,000.00). The beneficiary was the Atlas Lumber and Door Company, Inc., represented herein by the plaintiff-receiver, William A. Thorne.
>
> Included with the application was an aviation supplement covering the life of Reynolds in the event he died as a the result of an airplane crash.

After the application was filled out and signed, Knoop received a check made out by Reynolds to defendant's order in the amount of Eighty-Six and 56/100 Dollars ($86.56), representing the value of the first month's premium under the policy applied for. Said check was subsequently cashed on December 17, 1964, and the proceeds thereof were placed in the "Suspense Account" of the South Bend agency of defendant company.

As a part of the same December 10th transaction, agent Knoop gave Reynolds a form entitled "Binding Receipt for payment to apply on first premium". In pertinent part, said Receipt provided:

> (the insurance) shall be effective from the date of medical examination (being the last examination if more than one is required by the Company), subject to the provisions of the form of policy applied for, provided the Company shall be satisfied that on said date the applicant was insurable as a standard risk in accordance with its rules and practices for said amount on said plan.

7. Reynolds left South Bend, Indiana, by plane on December 23rd, 1964, for a vacation trip to Florida. That plane crashed in Florida, causing the death of Reynolds on January 3rd, 1965.

8. On January 8th, 1965, an agent of defendant forwarded a check in the amount of Three Hundred Twenty-Eight and 1/100 Dollars ($328.01) to Atlas Lumber and Door Company, Inc., made payable to that company. Accompanying said check was a letter stating that, "We are returning herewith payments submitted with applications for insurance on the life of Robert G. Reynolds since no policies were issued and no insurance became effective". The uncashed check and the letter remained in the hands of the receiver herein until January 12th, 1966, at which time the check was deposited by him in the Clerk's office of this Court. At all times there was sufficient money in defendant's account to honor the check. No objection was ever made as to inadequate tender of the premium amount.

9. No written policy of life insurance ever was issued by defendant company to Reynolds.

10. The defendant company has not paid the proceeds of any life insurance to the plaintiff or to any other person on account of the death of Reynolds.

11. Other relevant events and facts surrounding the December 10th, 1964, transaction are found to be as follows:

A. On September 30, 1964, Reynolds applied for a $33,000 decreasing term mortgage insurance policy. A "binding receipt" was issued. A medical examination was set up for Reynolds by an agent for two or three days hence. That appointment was not kept. On October 30th, 1964, and after Reynolds had missed several appointments previously scheduled, he took the examination for the $33,000 policy only after Knoop and Charles Pease, an agent for an independent insurance brokerage company, picked up Reynolds at his office and transported him by automobile to the doctor's office. On one occasion previous to October 30th, Reynolds had been told by Knoop that he had no insurance in full force until an examination was taken. Reynolds' reply was that he was aware of that fact and that he would get in for the physical.

Because of information obtained partially as a result of the October 30th examination and partially from other sources, Reynolds was requested to resubmit to another examination for which it was important that a current home office specimen with specific gravity be obtained. This was to be sent to defendant's home office in order that doctors there might correlate Reynolds' medical condition with the medical requirements for the $33,000 policy. Several appointments were set up for such examination at Reynolds' convenience, and he was repeatedly informed of the necessity that it be taken. Although Reynolds always maintained that he had no objection to taking this or any other examination, all such appointments were broken, with various excuses for so doing being offered. As of January 3rd, 1965, a second medical examination for the $33,000 policy had not been taken, although Reynolds told Knoop on December 10th that it had been.

B. During the period between October 30th, 1964, and December 10th, 1964, Aetna, as the result of information received from various sources, had become aware that Reynolds' case was "special class, at best". Aetna knew, prior to December 10th, 1964, that Reynolds was a substandard risk, at best.

C. On December 10th, 1964, at the time the application for the $100,000 policy was made, Reynolds was informed that a complete medical examination (which would also have sufficed for the September 30th application which was still pending) was necessary and that an electrocardiogram and chest x-rays were required for this policy. It would not have been issued without such information. The examination was set up in the presence and with the agreement of Reynolds for the following day. The appointment was not kept. Although Reynolds was again thereafter urged to keep such an appointment, none had been at the date of his death.

D. At the same December 10th meeting, Reynolds was informed that he would be, at best, a substandard risk. He was again told that coverage would not be in full force until such as the necessary medical requirements were met.

E. Reynolds indicated upon the application for the $100,000 policy that although insurance with "Great West" was then in force, the September 30th application for $33,000 mortgage insurance was still "pending".

12. Robert G. Reynolds was a man of considerable business acumen and experience, acquired as the result of extensive executive responsibilities.

13. Defendant did not at any time or in any way prior to January 8th, 1965, indicate that it thought that a $100,000 policy of life insurance on the life of Reynolds was in full force and effect. It consistently required that the conditions as to the taking of the medical examination and as to insurability be met.

14. As of January 8th, 1965, Aetna had made no determination as to whether or not Reynolds was insurable under any of its conditions, including insurability as a substandard risk, nor could it have made such a determination, since the medical evidence available to it at that time was not sufficient to enable it to make such a determination. The reason for the lack of such evidence was Reynolds' own refusal to cooperate in meeting the appointments for medical examinations set up for him.

BASIS FOR JURISDICTION OF THIS COURT

There is no basis for the jurisdiction of this Court.

The alleged basis for jurisdiction of this Court set forth in paragraph 1 at page 6 of the Petitioner's Petition is accomplished by extracting certain limited language from an Indiana case decided under an entirely different factual situation, and most particularly an entirely different binding receipt. The comparison of the facts of the *Vale* case with the facts of the instant case shows:

Vale case	*Reynolds case*
a. The receipt read: "Provided the insured be in sound health and over six months of age on the date of said application, the Company's liability under such policy, if and as issued, shall commence as of the date of said application."	a. The receipt read: "Insurance . . . shall be effective from the date of medical examination (being the last examination if more than one is required by the Company); . . . provided the Company shall be satisfied that on said date the applicant was insurable as a standard risk in accordance with its rules and practices for said amount on said plan."
b. Vale was a coalminer who could not read.	b. Reynolds was the president of two corporations doing over one million dollars a year business.

c. The agent told Vale that his insurance was in effect from the date of the receipt.	c. The agent told Reynolds that he had no insurance coverage until he completed the necessary medical examinations.
d. Vale was applying for an industrial policy which required no physical test for submission to the home office medical advisors.	d. Reynolds was applying for $100,000 of life insurance and required both a complete physical examination, a chest x-ray, an electrocardiogram, and home office specimen for submission to the Company's medical advisors for analysis.
e. Vale took the only medical examination required of him.	e. Reynolds did not take the physical examination nor did he submit any of the medical requirements.
f. There was no question of Vale's insurability as a standard risk.	f. Reynolds had consulted at least two physicians within the previous year and one-half for conditions and symptoms which could be extremely serious.

The same observation must be made as to paragraph 2 of the Petitioner's Petition alleging a basis for jurisdiction of this Court, namely that the Court in the instant case was dealing with an entirely different factual situation, and most particularly with an entirely different receipt than was being discussed by the Indiana Supreme Court in the case of *Western & Southern Life Ins. Co. v. Vale*, 213 Ind. 601; 12 N.E.2d 350 (1937). In fact the *Vale* case specifically comments on the fact that medical examinations and tests were not required to be submitted to the home office in that case. 12 N.E.2d at 355.

Paragraph 3 which the Petitioner sets out as his basis for jurisdiction of this Court has no basis in the record. The attempt to invoke the jurisdiction of this Court is undertaken in

this third paragraph by including the assertion: ". . . with its previous knowledge of all the facts when it issued its Binding Receipt." This is actually incorrect. Aetna had made no determination as to whether or not Reynolds was insurable, nor could it have made such a determination since the medical evidence available to it was not sufficient for this purpose. The reason that Aetna did not have the evidence to make the determination was Reynolds own refusal to cooperate in meeting the appointments for medical examinations set up for him. The Company at all times had consistently required that the conditions as to the taking of the medical examination and as to insurability be met. (Findings of Fact of the Trial Court, No. 13 and 14).

ARGUMENT

The allegations which are set forth as the basis for the jurisdiction of this Court are not correct on the record. The Seventh Circuit Court of Appeals in its decision *William A. Thorne, Receiver vs. Aetna Life Ins. Co.*, 407 F.2d 809 (1969) properly distinguished the facts of the instant case and those of the *Vale* case. Its decision and conclusion are correct.

The rule of law in Indiana as set out in the decision of *Prudential Ins. Co. of America vs. Lancaster*, 219 N.E.2d 607 (Ind. App. 1966) is stated:

> "The well established rule in Indiana is that our Courts can only enforce the terms of a contract as agreed upon, and have no authority to make a new or different contract."

With the express findings of fact made by the Trial Court that Aetna did not have the information necessary to make a proper determination in regard to Reynolds' insurability, for the reason that Reynolds had failed to cooperate in meeting the appointments for medical examinations set up for him, coupled

with the Court's Finding of Fact that the Company had consistently required that the conditions as to the taking of the medical examinations and as to insurability be met, (Court's Findings of Fact No. 13 and 14), there was no question of waiver to be decided by the Court of Appeals.

To constitute a "waiver" under Indiana law there must be an intentional relinquishment of a right which ordinarily must be predicated on full knowledge of all the facts. Where the Company expressly and clearly notifies the other contracting party in advance of its insistence upon the terms of the contractural agreement, there can be no waiver. *State Farm Mutual Automobile Ins. Co. vs. Phillips,* 210 Ind. 561, 2 N.E.2d 989 (1936).

CONCLUSION

The Petition for Writ of Certiorari asserts as its basis for the jurisdiction of this Court that the Court of Appeals had decided an important State question in a way that conflicts with applicable State law. The record shows that the Court of Appeals actually followed the applicable State law of Indiana.

The second ground for the jurisdiction of this Court is alleged to be the failure of the United States Court of Appeals to decide the question of waiver, inserting the premise . . . "with its previous knowledge of all the facts", an assertion which is squarely contrary to the record in this case.

The bases for the jurisdiction of this Court on Certiorari as set forth in the Petitioner's Petition for Writ of Certiorari do not exist on the record, and the petition should be denied.

Respectfully submitted,

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